In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 329

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE of the United States for the Eighteenth District of Ohio, petitioner

v.

WILLARD STORAGE BATTERY COMPANY

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The respondent has advanced certain arguments with respect to the constitutionality and application of Section 424 of the Revenue Act of 1928, which we desire to answer in this reply brief.

A

The respondent attacks the constitutionality of Section 424, however the section be construed. We have urged in our brief in *American Chain Co.* v. *Eaton,* No. 196, present term (pp. 12–14) that it was within the power of Congress to limit the right

of the taxpayer to a refund when the right was not linked to any substantial equity (see *Graham & Foster* v. *Goodcell*, 282 U.S. 409) and when unjust enrichment would result. The respondent, however, argues that the effect of the section is to recreate a liability for a tax that may be found to have been erroneously collected. We submit, however, that the effect of the section may not be so described. It does not tax articles that were exempt before its enactment; it simply prevents refunds to persons not equitably entitled to have them.

As we pointed out in the *American Chain Co.* brief (p. 12), the right to the refund had been limited by the Act of February 28, 1927 (c. 226, 44 Stat. 1250, 1254), and succeeding statutes embodying the same provisions. Section 424 of the 1928 Act did not further limit the right and, therefore, the respondent was not adversely affected by its enactment. The respondent's claims for refund were rejected June 21, 1927, on the ground that the respondent had indicated that it did not intend to prosecute the claims in accordance with Treasury Decision 4015 (VI–1 Cum. Bul. 299) outlining the procedure to be followed by the taxpayer in order to comply with the Act of February 28, 1927, *supra* (R. 9, 94, 108, 122 and 135). The provisions of Section 424 could only benefit the respondent, and the respondent had over ten months in which to commence a suit and secure the benefit. But the

respondent began no suit until May, 1929 (R. 1, 86, 100, 114, 128). We, therefore, do not think the respondent can complain that the result is unreasonable as applied to the facts presented here.

The respondent also contends that a construction of Section 424 which would place the making of refunds within the discretion of the Commissioner is violative of Section 1, Article 3, of the Constitution. It is, however, well settled that determinations of fact for administrative purposes may be intrusted to administrative officials without being subject to judicial review. *Phillips* v. *Commissioner*, 283 U.S. 589, 600; *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551, 560-561; *United States* v. *Babcock*, 250 U.S. 328; *Silberschein* v. *United States*, 266 U.S. 221. We submit that the determination left to the Commissioner by Section 424 is one of fact, i.e., whether the taxpayer has borne the economic burden of the tax. We submit, therefore, that there is no prohibited encroachment upon the judicial power.

B

The respondent urges that the plain and unambiguous words of Section 424 do not permit of the construction contended for by the Government. The Government's argument that Congress intended to place the determination of fact required by the section in the discretion of the Commissioner is based upon the words of the statute "established

to the satisfaction of the Commissioner." (See the brief in *United States* v. *Jefferson Electric Mfg. Co.*, No. 171, present term (pp. 17–18, 20–21).) The respondent has not answered the Government's argument in this respect, and has not pointed out the words of the statute which in its opinion require a contrary construction.

The respondent supports the decision below on the ground that Section 424 is an administrative provision and applies solely to repayment and not to a right of action. We have urged in our brief in the *Jefferson Electric Mfg. Co.* case, *supra*, that the Congressional purpose in enacting the section is frustrated by construction that would allow a suit for the refund without making the rule of the statute applicable in a judicial proceeding (pp. 11–13). That argument is an alternative contention and is advanced only on the assumption that we may be incorrect in our view that the determination was left to the discretion of the Commissioner.

As a corollary to its contention the respondent urges that the time has not yet arrived to apply Section 424. We have shown in the *Jefferson Electric Mfg. Co.* brief, *supra*, that such a procedure destroys the jurisdiction of the Court to render any judgment at all because the Commissioner would then be empowered to refuse payment of a judgment of a Federal Court. *Gordon* v. *United States*, 2 Wall. 561. The taxpayer is required to obtain a determination by the Commissioner before bringing an action in Court (pp. 19–20).

CONCLUSION

The respondent failed to secure a determination by the Commissioner of Internal Revenue with respect to the facts required by Section 424, and the respondent did not prove in this suit the facts required by Section 424. Because of either or both of those failures the judgment in favor of the respondent should be reversed.

Respectfully submitted.

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DECEMBER 1933.

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